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# REVISTA DE DIREITO INTERNACIONAL

BRAZILIAN JOURNAL OF INTERNATIONAL LAW

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ISSN 2237-1036

Revista de Direito Internacional Brazilian Journal of International Law	Brasília	v. 17	n. 3	p. 1-606	dez	2020
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# The principles of Cultural Heritage Law based on the Polish Law as an example\*

## Os princípios do Direito do Patrimônio Cultural baseados no Direito Polonês como um exemplo

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\* Recebido em 10/08/2020  
Aprovado em 04/03/2021

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### Abstract

The aim of this paper is to discuss the principles of cultural heritage law with a double perspective: under the lights of the philosophy and general theory of law and under the influence of the Polish legal vision. Among the whole set of legal norms, principles of law are of particular importance. The attribute that gives a legal norm the status of a principle is its importance for the legal system. In this paper the international, European and domestic principles of cultural heritage law in force in Poland will be discussed. With reference to the methodology, the research was undertaken at several levels, corresponding to the chapters of the papers. The conceptual apparatus of public and private law has mainly been used. The methodology adopted on the basis of the general theory and philosophy of law, in turn, made it possible to analyse the research problem (a catalogue of principles of cultural heritage protection law), and the dominant method in the research was the dogmatic one supported – if necessary- by the axiological method. An analysis of legal regulations in force in Poland was of significant importance for the formulation of a catalogue of principles of cultural heritage law. It was also essential to take into account the views of doctrine and the case law. The application of the above mentioned research methods was necessary due to the complexity of the research conducted to create a catalogue of principles of cultural heritage law and to build new solutions for separating this comprehensive branch of law.

**Keywords:** Cultural heritage law. Cultural heritage. Principles of law. Cultural property. Protection of cultural heritage. Historical monuments.

### Resumo

O objetivo deste artigo é discutir os princípios do direito do patrimônio cultural. Entre todo o conjunto de normas jurídicas, os princípios de direito são de particular importância. O atributo que confere a uma norma jurídica o estatuto de princípio é a sua importância para o ordenamento jurídico. Uma divisão significativa dos princípios jurídicos introduz uma distinção entre os princípios formulados diretamente no texto jurídico (princípios explícitos), os princípios intérpretes do texto jurídico, embora não expressos

explicitamente no texto jurídico (princípios implícitos), e os princípios de direito não expressos em atos legislativos, mas constituindo um elemento de cultura jurídica (princípios implícitos de segundo grau) e fazendo parte do sistema de direito. A lei de proteção do patrimônio cultural é agora considerada um ramo abrangente do direito. Um dos critérios básicos para separar um ramo do direito é a existência de seus próprios princípios de direito, premissa que se cumpre em relação ao catálogo de princípios apresentado no artigo. Torna-se significativo o impacto real da jurisprudência do tribunal na interpretação dos regulamentos legais relativos à legislação de proteção do patrimônio cultural, porém a maior influência pode ser observada no estabelecimento de seus próprios princípios. O princípio fundamental é o princípio da proteção do patrimônio cultural. Entre este princípio podem ser distinguidos outros princípios do direito de proteção do patrimônio cultural em particular (com a ressalva de que o catálogo apresentado no artigo tem caráter aberto): o princípio do acesso ao patrimônio cultural, o princípio da integridade do patrimônio cultural, o princípio da proteção da propriedade, o princípio da utilidade social, o princípio do controle da preservação do patrimônio cultural, o princípio do desenvolvimento sustentável, o princípio da mudança do valor de utilidade do patrimônio cultural ao longo do tempo, o princípio do financiamento de um monumento histórico pelo proprietário, o princípio do financiamento com recursos públicos; princípio da proporcionalidade. Tal catálogo dos princípios relativos à lei de proteção do patrimônio cultural deve ser formulado.

**Palavras-chave:** direito do patrimônio cultural, patrimônio cultural, princípios de direito, propriedade cultural, proteção do patrimônio cultural, monumentos históricos

## 1 Introduction

The principles of law are components of a dynamic and highly complex system: the law of contemporary society. As part of a general theory of law they are recognised not as an isolated discourse but as a decisive element for the dynamization of the legal culture. They are one of the most significant normative constructs, becoming, at the same time, the popular subject of legal research in both theoretical and dogmatic perspectives. The feature that gives a legal norm the status of a prin-

ciple of law is its importance for the legal system. What can be easily observed, the system of law is recognised as a set of norms with similar logical dependencies and it is based on common principles. Thus it is the very definition of a system of law that determines the importance of principles in its creation, and the lack of principles makes it impossible to name such a set of norms a system of law.<sup>1</sup> The legal principles deserve also particular attention especially because of the fact that at present they have become the most important instrument of judicial activism. Legal cases are more or less difficult to solve, depending on the difficulty of finding a unique optimal equilibrium and the principles become a guidance for the executive authorities to make a decent decision.<sup>2</sup>

In modern jurisprudence it is accepted that principles of law are used in two main meanings - descriptive and directive. In this article latter meaning is adopted. Although it should be noted that there is no one universally accepted definition of the principles of law and multitude of concepts exist. As directive statements, they might be interpreted from legal acts and they assign their addressees in certain circumstances a given pattern of behavior. The principles of law might also be seen as legal norms that protect an important good, express certain values and serve to implement specific ideas. Thus legal principles are understood as legal norms which order (forbid) the realization of a certain value.<sup>3</sup>

Currently, the axiological provenance and normative content of the principles of law as well as their functions in the legal order with a special regard to application and interpretation of law by courts become very crucial. Ronald Dworkin pointed out that the law, which is the ground for judicial judgements, consists of rules and principles. It must be noted that judges resolve ca-

<sup>1</sup> See: KORDELA, M. *Zasady prawa: studium teoretycznoprawne: the principles of law: theoretical legal studies*. Poznań: Wydawnictwo Naukowe UAM, 2014.

<sup>2</sup> See: MORAWSKI, L. *Główne problemy współczesnej filozofii prawa: prawo w toku przemian: main problems of modern law philosophy: law in the process of transformation*. Warsaw: Wydawnictwa Prawnicze PWN, 2003.

<sup>3</sup> ZEIDLER, K. *Przestrzenie badawcze prawa ochrony dziedzictwa kultury: research areas of the law on the protection of cultural heritage*. *Gdańskie Studia Prawnicze*, v. 32, p. 147-154, 2015. See also: TKACZ, S. *O zintegrowanej koncepcji zasad prawa w polskim prawnictwie: od dogmatyki do teorii: the integrated concept of the principles of law in Polish jurisprudence: from dogmatic to theory*. Toruń: Wydawnictwo Adam Marszałek, 2014.

ses basing on such principle, even against what a rule established.<sup>4</sup>

In turn, Manuel Atienza and Jose Manero developed this idea and stipulated that the difference between rules and principles, as far as the conditions for their application seems to be a matter of grade. It must be stressed that is not the legal text that determines which category the legal norms fall into, but the way it is used in the law enforcement process. It is therefore not the legislator who gives norms the status of rules or principles, but the interpreter who decides how he uses a legal text. The distinction of the catalogue of principles is strongly associated with case law and the doctrine that determine which norms constitute principles of law. The normative basis for decisions is a specific legal provision in a normative act, and principles of law are used as arguments in favour of the decision that is taken.<sup>5</sup>

According to Slawomira Wronkowska the special role of legal principles in the legal system is that: first of all, they set the course of legislator's actions. They indicate what the legislator should achieve by making laws and what values in the legislative process must not be infringed. Moreover they mark certain ways of shaping some legal institutions; secondly, they guide the interpretation of the law, which is very important as legal principles are also interpretative directives; thirdly, they demonstrate the directions of application of the law; finally, fourthly, they direct how to deal with the different rights that are available for its holders.<sup>6</sup> Equally important, legal principles are often optimisation directives. It means that some of them set certain ideas and goals that should be implemented as much as possible, taking into account factual and legal possibilities. It has to be noted that the ideal situation might never be achieved.

<sup>4</sup> See: DWORKIN, R. *A matter of principle*. Cambridge: Harvard University Press, 1995.; DWORKIN, R. *Law's empire*. Cambridge: Harvard University Press, 1986.

<sup>5</sup> See: ATIENZA, M.; MANERO, J. R. *A theory of legal sentences*. Dordrecht: Springer Netherlands, 1999.; ATIENZA, M. Is legal positivism a sustainable legal theory? In: GIZBERT-STUDNICKI, T.; STELMACH, J. (eds.). *Law and legal cultures in the 21 st Century: diversity and unity*. IVR World Congress, 23. August 1-6, 2007. Cracow, Poland. Warsaw: Wolters Kluwer, 2007.; ATIENZA, M. On the reasonable in law. *Ratio Juris*, v. 3, n. 1, 1990; ATIENZA, M.; MANERO J. R. Permission, principles and rights: a paper on statements expressing constitutional liberties. *Ratio Juris*, v. 9, n. 3, p. 236-247, 1996.

<sup>6</sup> WRONKOWSKA, S.; ZIELIŃSKI, M.; ZIEMBIŃSKI, Z. *Zasady prawa: zagadnienia podstawowe: the principles of law: basic concepts*. Warsaw: Przedsiębiorstwo Wydawnicze Ars boni et aequi, 1974. p. 187.

In turn, legal rules should be made in accordance with factual possibilities of their application. On the contrary, principles of law may set the directions and objectives that lead to the desired state, even when it is known that it is very distant from reality.

In this paper the principles of the protection of cultural heritage law will be discussed. It demonstrates how the philosophical legal concepts are useful in studies on cultural heritage protection law and its principles. The extensive research conducted at present in the indicated scope exposed the existence of them in the cultural heritage law and became the basis for their suggested catalogue.<sup>7</sup>

In the process of implementing cultural heritage law, there is also a need to weigh legal principles in relation to the values they protect. Conflicting values or legal requirements can make rationally deduced solutions unattainable and they need to be weighed in the process of implementing the law and in search of equilibrium between them. There is a controversy what values should be given priority to a particular case and it is common that the courts' decisions become discretionary. The decision concerning the "superiority" of one principle to another is connected with a court ruling in a concrete case and in another case a completing different "weighing up" of values might be made. The actual impact of the court jurisprudence on the interpretation of legal regulations concerning cultural heritage protection and explanation of the meaning of law becomes significant, however the greatest influence can be seen in establishing of its principles.<sup>8</sup>

<sup>7</sup> ZEIDLER, K. *Zasady prawa ochrony dziedzictwa kultury: propozycja katalogu: the principles of the law on the protection of cultural heritage: the proposed catalog*. *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, n. 4, 2018. p. 147; WĘGRZAK, M. *Zasady prawa ochrony dziedzictwa kultury w orzecznictwie sądów administracyjnych: the principles of cultural heritage protection law in administrative courts' decisions*. Gdańsk-Warsaw: Wydawnictwo Uniwersytetu Gdańskiego, 2020. p. 107.

<sup>8</sup> WĘGRZAK, M. *Zasada dostępu do zbiorów muzealnych a ich ochrona: the principle of access to museum collections and the principle of cultural heritage protection*. In: GREDKA-LIGARSKA, I.; ROGACKA-LUKASIK, A. (eds.). *Muzea: aspekty praktyczne i prawne: museums: practical and legal aspects*. Sosnowiec, 2018. p. 13-20; WĘGRZAK, M. *Zasada społecznej użyteczności zabytków w kontekście turystyki kulturowej: the principle of social utilities of cultural heritage with reference to cultural tourism*. In: DOBOSZ, P.; GÓRNY, W.; MAZUR, A.; KOZIEN, A. (eds.). *Prawo ochrony dóbr kultury, jako narzędzie innowacyjności turystycznej w strukturach lokalnych: the law of cultural goods protection as an instrument for tourism innovation in local structures*. Kraków: Publikacje Naukowe KN Prawnej Ochrony Dóbr Kultury, 2019. p. 41-57.

## 2 Typologies of the principles of law

Among the most important typologies of legal principles, the following should be distinguished: 1) legal principles explicitly formulated in legal texts (explicit principles); 2) those that might be interpreted from legal texts, although not explicitly expressed in them (implicit principles); 3) legal principles that are not expressed in legal acts but that are a part of the legal culture (implicit principles of second degree).

The binding character of some principle may be based on the fact that it has been explicitly formulated in the legal text, or that might be decoded from the legal text in the process of applying the law. A binding nature of legal principle may also be based on an uncontested doctrine opinion regarding its legal validity (positive justification), in the absence of legal provisions that excludes this principle from being applicable in a particular legal system (negative justification). Principles that have such a justification for their validity are undisputed components of historically shaped political and legal culture and can be considered as a kind of customary norms.

Based on another criterion of the division of legal principles, the following are distinguished: universal principles, understood as principles of the whole system of law, and particular principles, understood as the rules of a part of the legal system. Regarding this selection, more specifically, one can distinguish: 1) the general principles of system of law that are usually constitutional principles; 2) the principles of particular branches of law; and 3) the principles that are specific for a particular legal act. In this case they are treated as the regulatory ideas of the legal system, its individual branches, and sometimes specific legal regulations. Moreover, principles of law play a special role in the construction of the legal system, branches of law or legal institutions.<sup>9</sup>

Finally, the division of legal principles may concern their origin, i.e. distinguishing them: 1) principles of national law; 2) principles of European law; 3) principles of international law. However, due to the integration of these legal orders one and the same principle can be -

and very often is - a principle of national law, European law and international law at the same time. The presented division is by no means a separate one. Some general principles can also be principles of a given branch of law while some of the particular ones are interbranches of law.

## 3 Cultural heritage law and its principles

While analysing the system of cultural heritage protection, it is not possible to limit it only to a normative analysis. The model of the system of cultural heritage protection should take into account at least three instruments: legal, financial and those that raise social awareness of the importance of the issue, including in particular public participation and the awareness of state authorities.<sup>10</sup> Anyway, in the article we focus on legal (normative) aspect on cultural heritage protection. What can be observed is the fact that the division of the legal system strictly into branches due to the mutual interaction of them and the influence of international law might be difficult in a situation of evolving legal culture. Depending on the tradition, methods of regulation and opinions of doctrine certain groups of legal norms regulating a specific sphere of social relations are considered to be a branch of law. The legislator rarely clearly defines to which branch of law he classifies the norms that he creates and it is mostly the work of jurisprudence and legal doctrine. It is worth noticing that at present the existence, next to or more often within several branches of law, the so-called comprehensive branches of law. The branches of law are understood as a set of legal norms separated according to specific criteria are accepted. One of the criterium for separating them of law is having its own principles of law. It should be stressed that cultural heritage protection law is recognized at present as a comprehensive branch of law and one of the most important prerequisite for its autonomy is the existence of its own legal principles.<sup>11</sup>

<sup>9</sup> See: WRONKOWSKA, S.; ZIELIŃSKI, M.; ZIEMBIŃSKI, Z. *Zasady prawa: zagadnienia podstawowe: the principles of law: basic concepts*. Warsaw: Przedsiębiorstwo Wydawnicze Ars boni et aequi, 1974.

<sup>10</sup> ZEIDLER, K. *Zabytki. Prawo i praktyka: historical monuments, law and practice*. Gdańsk-Warsaw: Wydawnictwo Uniwersytetu Gdańskiego, Wolter Kluwer, 2017. p. 79.

<sup>11</sup> See: ZEIDLER, K. *Prawo ochrony zabytków jako nowa gałąź prawa: cultural heritage protection law as a new branch of law*. In: ZEIDLER, K. (ed.). *Prawo ochrony zabytków: cultural heritage protection law*. Gdańsk-Warsaw: Wydawnictwo Uniwersytetu Gdańskiego, Wolter Kluwer, 2014. p. 28; ZEIDLER, K. *Zasady prawa ochrony*



What is worth mentioning here is that, there are a significant number of general principles of the legal system and the principles of individual branches of law that are relevant for the law on the protection of cultural heritage. It seemed, however, that the principles that are unique only for this complex branch of law might be simultaneously general principles of law or principles of individual branches of law. Nevertheless, they specify their content on the basis of the cultural heritage protection law. For example, given that the basic instruments for legal protection of monuments are provided by administrative law with a special regard to administrative procedure, all principles of the code of administrative procedure become principles of cultural heritage protection law. Similarly, certain principles of European law regarding the protection of European heritage are the principles of cultural heritage protection law, in particular the principle of subsidiarity, the principle of proportionality or the principle of sustainable development. Besides this the general principles of the system of law, such as the principle of access to information or decentralisation, are of the great importance. In this paper, however, the principles specific to cultural heritage protection law in Poland will be discussed.

Firstly, the constitutional principles shall be considered and among them the principle of cultural heritage protection. This principle has the character of the so-called metaprinciple of cultural heritage protection law, that not only other principles of law should be interpreted in the light of this principle but all provisions of national law without exception - both those that fall under cultural heritage protection law as well as others, classified under other branches of law.<sup>12</sup> On one hand it is the constitutional principle based on the preamble and Article 5 of the Constitution of the Republic of Poland, on the other hand it is so-called meta - principle of cultural heritage protection law. It is stipulated

that "The Republic of Poland shall [...] safeguard the national heritage and shall ensure the protection of the natural environment pursuant to the principles of sustainable development".<sup>13</sup> In the light of this principle not only other principles of cultural heritage law but also legal regulations regarding given subject should be interpreted.

Another constitutional principle of cultural heritage - the principle of access to cultural objects - is expressed in Articles 6 and 73 of the Constitution. The first of these provisions imposes an obligation on state authority to provide conditions for equal access to cultural goods that are the source of the Nation's identity, continuity and development. The constitutional order to preserve and promote cultural heritage can be designated to public authorities. The society, however, is also involved in these obligations. Historical and artistic goods have a special value because of their role as a link between past, present, and future. As seen from the above example, Article 5 of the Constitution of the Republic of Poland has a systemic meaning in the sense that its normative meaning extends to the whole system of law and the direct addressee of the obligation is the State in its entirety, and consequently all its organs; although of course this task is carried out by a specialised governmental administration (in Poland the Ministry of Culture and National Heritage).

The principle of cultural heritage protection, however, requires a broad systemic approach and needs correction of its interpretation. It has to be noticed that its linguistic interpretation in Polish law should not prevail. Literally it is prescribed to protect the national heritage only, regardless of the definition of a nation that it is commonly used such as political, ethnical etc - *a contrario* that there is no obligation to protect a heritage that is not national. Thus, it must be considered that the basis for the principle of cultural heritage protection is in Article 5 of the Constitution, but its content needs to be adjusted in the process of the interpretation of the law, taking into account the meaning of other legal provisions, the Constitution as well as the broader systemic context.

dziedzictwa kultury: propozycja katalogu: the principles of the law on the protection of cultural heritage: the proposed catalog, *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, n. 4, 2018. p. 147; WĘGRZAK, M. Zasada ochrony dziedzictwa kultury w świetle wybranego orzecznictwa sądów administracyjnych: the principle of the protection of cultural heritage in the light of selected administrative courts' decisions. *Zeszyty Naukowe Sądownictwa Administracyjnego*, v. 13, n. 3, p. 52-72, 2017. p. 52; LIESA FERNANDEZ, Carlos R. Cultura y derecho internacional: the culture and international law. *Cudernos de la Catedra de Democracia y Derechos Humanos*, Alcalá de Heranes - Madrid, n. 8, 2012. p. 52.

<sup>12</sup> BRODECKI, Z. (ed.). *Europa sędziów*: Europe of judges. Warsaw: Wolter Kluwer, 2007.

<sup>13</sup> Constitution of the Republic of Poland, *Journal of Law of 1997*, No. 78, item 483 as amended.

## 4 The proposal of a catalogue of the principles of cultural heritage protection law

In an attempt to create a catalogue of the principles of cultural heritage protection law, the following will be discussed: the principle of protection of cultural heritage, the principle of access to cultural heritage, the principle of integrity of cultural heritage, the principle of property protection, the principle of social utility, the principle of control of preservation of cultural heritage, the principle of sustainable development, the principle of cultural heritage management, the principle of changing the utility value of cultural heritage over time, the principle of funding historical monument by the owner, the principle of funding from public resources, the principle of proportionality. It is worth nothing that the given proposal is not closed and other principles might be found. In this paper some of the principles given above will be considered.

With regards to the principle of access to cultural heritage it must be stressed that cultural heritage property should be commonly available without imposing restrictions on the recipients of culture. However, the obligation to create conditions for the dissemination of cultural goods, should be implemented by taking into account the principle of cultural heritage protection and the principle of integrity of cultural heritage. The principle of access to historical monuments is also a constitutional principle, expressed in Articles 6 (1) and 73 of the Constitution of the Republic of Poland. The first of these provisions imposes an obligation on State authorities - stating that the Republic of Poland creates conditions for the dissemination and equal access to cultural goods, which is the source of the identity of the Polish nation, its duration and development; the second Article grants a subjective right, stating that everybody is provided with the freedom of artistic creation, scientific research and to announce their results, to teach and to use the cultural goods. This principle is situated in chapter II of the Polish Constitution: Freedoms, rights and obligations of the human being and the citizen, in the section devoted to freedoms and economic, social and cultural rights.

It has to be noticed that the principle of access to culture is limited by the principle of cultural heritage protection as well as the principle of integrity of cul-

tural heritage. The concept of integrity refers to the connection between an author and their creation and the protection of the personal and reputational, rather than monetary value of their work.<sup>14</sup> Thus the right of integrity is known as a right of an author to prevent all modification: revision, alteration, or distortion of their work, regardless of who owns the work. Two distinct objectives in the right of integrity may be found: the preservation of cultural heritage and the protection of an author's reputation and moral rights to their work. Moreover the issue of ownership of work, if it is recorded in a material form, might also be considered.

It is said that the principle of integrity of cultural heritage is similar to the principle of integrity of works in copyright. Some claim, however, that it differs significantly in purpose, because it is not much for the protection of the author's rights as for the protection of cultural heritage object itself from interference in its shape and form. Thus, it is directly connected with the recommendations developed on the basis of conservation theory. The preservation of the original is also in the public interest to maintain cultural heritage for the future generation and the concept of cultural heritage as a common good since because of its special qualities and values. It leads to the conclusion that cultural heritage is public property.<sup>15</sup>

Establishing the boundaries of compromise in the protection of cultural heritage becomes a challenge, especially the necessity to balance the public interest (general social interest) and the individual interest (investor or owner). One should argue that preservation of cultural property as a testimony of the past is in the public interest. The values that can be in conflict is the protection of cultural heritage, due to the social dimension of the protected value and private property. By emphasizing the goal of preserving the cultural heritage for future generations, the attention is displaced from the object of protection itself and its relations with the nation to the concept of protection of the interest of the

<sup>14</sup> NIŻANKOWSKA, A. M. *Prawo do integralności utworu*: right to the integrity of the author's work. Warsaw: Wolter Kluwer, 2007. p. 89; See also: BARTA, J.; MARKIEWICZ, R. *Prawo autorskie*: copyright law. Warsaw: Wolter Kluwer, 2008.

<sup>15</sup> See: MERRYMAN, J. H. The public interest in cultural property. *California Law Review*, v. 77, n. 2, 1998.; PROTT, L. V.; O'KEEFE, P. J. 'Cultural heritage' or 'cultural property'?. *International Journal of Cultural Property*, v. 1, n. 2, 1992; also: SAX, J. L. *Playing darts with a Rembrandt*: public and private rights in cultural treasures. Michigan: The University of Michigan Press, 2001.

successors. This principle does not reject the existing achievements in the field of restitution and repatriation of works of art, protection of monuments in the situation of warfare and it does not conflict with the solutions adopted in the European Union law concerning the return of illegally exported objects as well as the regulation of cross-border movement of monuments.<sup>16</sup>

The principle of property protection and the right of ownership has to be balanced with the protection of integrity of cultural heritage and the principle of protection of cultural heritage. As the protection of cultural property is not just in the owners' interests but in that of the whole society, their entitlements to possession of cultural objects are limited. This leads to the conflict between public and private good. In the light of this discussion on the interests, public or private, the principle of priority of interest might be seen. It has to be stressed that currently, in the age of the protection of human rights, the abovementioned collision is not always resolved in favor of the public interest. As a result, various values, rights and causes are weighed up.<sup>17</sup>

Nevertheless, the principle of property protection is very important in the light of ownership divisions of monuments. It is the owner's duty, above all, to provide the most effective protection of cultural objects that they own and to maintain them in a good condition.<sup>18</sup> It must be noted that the ownership of cultural heritage is severely limited by many duties laid upon them and in fact the only part who makes a decision relating to the cultural heritage object is the state.<sup>19</sup> According to Article 5 of the Polish act on protection and preservation of monuments of 2003 the guardianship of monuments by its owner, or its proprietor consists, in particular, in ensuring conditions for protection, and

maintenance of a monument and its surroundings in the best possible state and use of a monument in a way ensuring permanent preservation of its value.<sup>20</sup>

Other principle, the principle of social utility of cultural heritage is based on the thesis that historical monuments should be used well nowadays; one could say: they should be "socially useful". This principle, derived from the category of a historical monument as a common good, is combined with the principle of access to cultural heritage.<sup>21</sup> According to the contents of this principle, a cultural property should not be perceived as belonging only to the owner or disposer of this monument, and its protection and preservation in the best possible condition for future generations should be implemented, even if, as a result, it may be opposed to the rights and freedoms of individuals.

Besides this, the principle of control of the preservation of monuments is connected with the concepts of control, supervision and monitoring that are well known for science of administration. To effectively achieve the objectives defined as protection or care of monuments, it is necessary to obtain current information on the condition of monuments to influence - both by soft measures and by more powerful actions - influence the owners and holders of monuments so as to limit the negative impact on cultural heritage.

The principle of sustainable development is one of the fundamental principles of law of environmental protection, being both a universal principle - and that's because it was expressed directly in Article 5 of the Constitution of Republic of Poland - as well as a particular rule of law environmental protection. However, it turns out that this principle it can be effectively adapted to the cultural heritage law.

Next, the principle of cultural heritage management includes both the protection and care of monuments, as well as the sphere of their utility value, i.e. contemporary use of a monument and the creation of access to its explorations. Proper management of cultural heritage is most widely manifested in historical cities. This principle is connected with a change in approach to the

<sup>16</sup> JAGIELSKA-BURDUK, A. *Zabytek ruchomy: movable monument*. Warsaw: Wolter Kluwer, 2012.

<sup>17</sup> ZEIDLER, K. *Restitution of cultural property: hard case: theory of argumentation: philosophy of law*. Gdańsk-Warsaw: Wydawnictwo Uniwersytetu Gdańskiego, Wolter Kluwer, 2016. p. 87.

<sup>18</sup> DOBOSZ, P. *Apekty prawne systemu ochrony dziedzictwa w Polsce: legal aspects of heritage protection in Poland*. In: PURCHLA, J. (ed.). *Zarządzanie miejscami wpisnymi na Listę Światowego Dziedzictwa UNESCO w Polsce i w Norwegii: Management of UNESCO World Heritage Sites in Poland and Norway*. Kraków: Międzynarodowe Centrum Kultury, 2011. p. 71.

<sup>19</sup> DRELA, M. *Własność zabytków: ownership of historical monuments*. Warsaw: Wolter Kluwer, 2006. p. 4; See also: ZEIDLER, K. *Restitution of cultural property: hard case: theory of argumentation: philosophy of law*. Gdańsk-Warsaw: Wydawnictwo Uniwersytetu Gdańskiego, Wolter Kluwer, 2016.

<sup>20</sup> Act of July 23, 2003 on protection and preservation of monuments, Journal of Law of 2020, item Journal of Law of 2020 item 282,782 as amended.

<sup>21</sup> See: ZEIDLER, K. *Restitution of cultural property: hard case: theory of argumentation: philosophy of law*. Gdańsk-Warsaw: Wydawnictwo Uniwersytetu Gdańskiego, Wolter Kluwer, 2016.



issue of historical monuments' protection, where the idea of the protection, understood classically as being left unchanged is abandoned in favour of the so-called "management of a change". One can notice that the interference with the substance of a historical monument, some changes in its function and its utility values is accepted so that it can be used at present and thus well preserved. As a result, the approach to the management as a process involving local communities and individual local government prevails. An important element of this process is to ensure adequate public participation, also at the decision-making stage.

Other principle, the principle of changing the utility value of cultural heritage over time, is based on the function of a historical monument, that also might change during the period of time. To protect monuments effectively such a modification should be accepted, so that today, unlike in the past, they can be used. To give an example, the new destination for the use of a historical building might be found. As a result, they are converted into cultural institutions, hotels, museums or restaurants. This counteracts the situation in which such historical buildings could be destroyed and ruined while being abandoned and not properly maintained. Even if a given cultural heritage object fulfilled certain functions in the past, nowadays it may have a different use. Moreover, a historical site with a significant usable value can strengthen it over time, gaining additional value and thus also a property value. On the other hand, a monument presenting a specific property value might lose it, gaining its historical or scientific value over time.

The principle of financing historical monuments by the owner of the monument is linked to the ownership issue and the fact of owning a monument with responsibility for financing the activities regarding the monuments. This principle is in relation to the principle indicated below, i.e. the principle of public funding. It is important to find appropriate proportions between the implementation of these two principles. However, it has to be considered that we recognise monuments as a common good, whose preservation is in the interest of the whole community, not just the individual (owner or the holder of a monument). As a result, the conservation authority may interfere with the performance of owner's duties. Thus, the implementation of owners obligations should be compensated and financially supported by the administrators of public funds. It is therefore important that the relationship between

these principles regarding monuments' maintenance is properly arranged.

The general rule provided in the act on the protection and preservation of monuments, is the obligation to finance conservation, restoration and construction works on monuments by entities having legal title to dispose of them, including their owners. It follows from the content of Art. 5 of the Act on the protection and preservation of monuments that stipulates that the care of the monument is of an individual nature, and the current legal disposer of a monument is responsible for its implementation. This is manifested, among others, in the use of the monument in a manner ensuring permanent preservation of its value and the obligation to finance conservation, restoration and construction works regarding the monument.

The principle of financing from public funds, concerning in particular, the financing of the care of the monuments, is inextricably linked to the principle of the previous one, i.e. the principle of financing by the owners of the monument. It should be pointed out that these principles are adversarial and the applicable law introduces solutions that give priority to one or to the other. However, it is recommended to consider one of them as *lex generalis*, the other as *lex specialis*, so that it is not necessary to weigh these principles every time, but only (once the legal prerequisites are met) apply given legal regulations.

Another principle, the principle of proportionality, is an important procedural principle. It manifests itself in the fact that public administration bodies are obliged to protect cultural heritage that preservation is in the public interest. It might make necessary to limit the sphere of ownership of the owner of the monument, but only to the necessary extent, taking care of the selection of specific measures to protect both the interests of individuals and specific social goods. The interference in the area of individual rights must remain in a reasonable and appropriate proportion to the objectives justifying the restriction. Thus, the postulate of necessity, usefulness, and proportionality of the restrictions introduced should be realized.

The principle of proportionality allows for the settlement of a dispute between the common good and individual interests. In specific states of fact such interests often are in collision with each other. The principle of proportionality is, therefore, extremely important while

the conflict of legal principles appears. It allows for the solution of this collision by giving the priority of one principle above another in a particular case. In case of a conflict of principles, the court applies the principle more relevant in a given situation, which does not mean that the second one is not in force or that in another case the order of preferences may be different. If possible, the court should apply these principles taking into account the principle of proportionality. With regard to the law on the protection of cultural heritage, this principle therefore shows the relevance of the objectives and the measures needed to achieve a given aim, taking into account the obligation to preserve cultural heritage in the best possible condition for future generations, which derives from the principle of cultural heritage protection.

## 5 Conclusions

Gdansk (formerly Danzig) is a Polish city that stands out for protecting cultural heritage. Due to its rich history, Gdansk was destroyed and rebuilt many times and became an international center for multidisciplinary research in the reconstruction and protection of cultural heritage. Against this background, could the authors add, in a paragraph, why it is relevant to publish, in an international academic journal, an analysis of the principles of cultural heritage law applicable in Poland?

It should be stressed that the research conducted in Gdańsk in the area of principles of cultural heritage law based on Polish law may have universal meaning and be applicable in other countries. Gdansk (formerly Danzig) is a Polish city that stands out for protecting cultural heritage. Due to its rich history, Gdansk was destroyed and rebuilt many times and became an international center for multidisciplinary research in the reconstruction and protection of cultural heritage. The presented axiological approach to cultural heritage and its principles might be an example for others jurisprudence.

Most of the principles outlined here applies jointly to the protection of immovable and movable cultural heritage. It is worth noting – what is somehow due to the complex nature of the branch of cultural heritage protection law - that most of the legal principles of the above mentioned are the rules, whether of systemic, individual branches of law or legislative acts. Only some

of them, like the most important one - the principle of the protection of cultural heritage - are principles specific for law on the protection of cultural heritage. Moreover, some of these principles have their origins in international law, as well as in so-called international doctrinal documents (soft law).

The *lege ferenda* it can be considered, first of all, which of the above presented principles should be explicitly stated in the legislative act governing the law on protection of cultural heritage. Secondly, it is necessary to formulate the content of legal provisions of this act in a way that expresses the principles as appropriate as possible. Fulfilling these requirements will lead to the strengthening the legal system of cultural heritage protection and will emphasize its importance for development of the cultural identity of the society.<sup>22</sup> What has to be noted, the development of social awareness and values connected with culture guarantees preservation of its heritage for future generations.

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